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No. 96-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER AND STEVEN ROBERT BAKER,
BY HIS NEXT FRIEND, MELISSA THOMAS
Petitioners,

VS.

GENERAL MOTORS CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

The Association of Trial Lawyers of America ["ATLA"] is a national bar association of more than 50,000 attorneys who primarily represent plaintiffs in personal injury actions, including injury or death caused by unreasonably dangerous and defective products. Letters of consent from the parties have been filed with the Court.

ATLA firmly believes that access to the courts for legal redress of wrongs is essential to our system of government. To enforce private agreements designed to deprive the courts of relevant evidence permits powerful private interests to manipulate the justice system. ATLA further believes that litigation serves a vital function of uncovering information that may be of crucial importance to the public. For this reason, ATLA has worked to eliminate confidentiality agreements that permit parties to hide information from the public involving matters of health and safety.

SUMMARY OF THE ARGUMENT

The court below erred in concluding that the Full Faith and Credit Clause required the district court to enforce the Michigan injunction upon demand by GM. Although the Clause requires a court to respect a judgment entered by the court of another state, the forum state retains the power to decline to enforce a judgment that violates the state's own laws or public policy.

The court below has imposed a novel remedy for violation of an injunction. In addition to contempt proceedings against the violator, the lower court held that testimony violative of the injunction is inadmissible in an unrelated civil action. In effect, the decision below permits private litigants to purchase a privilege to prevent adverse testimony.

By enforcing a private agreement that a witness with relevant evidence shall not testify the lower court's decision contravenes important public policies. The principle that the courts are entitled to every person's testimony is essential to the administration of justice.

In addition, permitting a private litigant to bar adverse testimony violates the strong public policy favoring openness of the courts and makes the civil justice system an instrument to the concealment of information affecting public health and safety.

ARGUMENT

I. THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE THE EXCLUSION OF TESTIMONY BY A WITNESS WHO HAS BEEN ENJOINED FROM TESTIFYING BY A COURT OF ANOTHER STATE.

The issue in this case is stark and reaches to the very foundations of the role of the judicial branch of our government. The decision below sets aside the principle that the courts are entitled to every person's testimony, *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). Instead, the lower court held that an agreement between private parties that one will not testify against the other is binding on all courts, rendering such testimony inadmissible in a civil action by a third party.

A. Violation of a Court Order Prohibiting an Expert From Testifying Subjects the Expert to Penalties, But Does Not Render Such Testimony Inadmissible in All Courts.

Plaintiffs' mother was burned to death when the Chevrolet Blazer in which she was riding caught fire after a collision. Their products liability action against General Motors Corporation alleged that the vehicle was defectively designed with the result that the fuel pump continued to pump gasoline to the engine after impact.

The number of persons who can testify with expertise on the design of the GM fuel pump system is limited. One is

Ronald Elwell, a former GM employee who studied fuel-fed fires in GM vehicles and recommended design changes. Elwell testified that a defect in the fuel pump system contributed to the fire in this case. The jury returned a verdict against GM.

The Eighth Circuit reversed, in part on the ground that the district court should not have permitted Elwell to testify. Elwell had previously sued GM over his discharge by the company. The parties reached a settlement of these and other claims. As part of their agreement, GM and Elwell stipulated to the entry of an injunction prohibiting Elwell from testifying in any products liability case against GM without its consent. The Eighth Circuit held that the Full Faith and Credit Clause, U.S. Const., art. IV, §1, required the district court to exclude Elwell's testimony.

Contrary to the characterization by the court below, this is not a case in which the district court refused to give full faith and credit to the Michigan injunction. The Full Faith and Credit Clause, and its enabling statute 28 U.S.C. §1738, requires the forum court to give the same effect to a judgment that it would receive in the foreign jurisdiction. If General Motors had initiated contempt proceedings in a Missouri court against Elwell for violation of the Michigan injunction, the Missouri court would be faced with the obligation to give the injunction full faith and credit. The Michigan order did not purport to prohibit the courts of Michigan or elsewhere from admitting Elwell's testimony.

Amicus submits that the Eighth Circuit erred in determining that to give full faith and credit to the Michigan order judges in products liability actions against GM must rule Elwell's testimony inadmissible on demand by GM. Such an "exclusionary rule," is not a provision of the Michigan injunction. Rather, it is was created by the lower court as punishment for violation of the injunction -- in addition to the availability of contempt sanctions against Elwell himself --

directed at innocent third parties. Amicus further submits, in Part II below, that this novel privilege of a party to exclude testimony based on a private agreement, violates strong public policies.

B. The Full Faith and Credit Clause Does Not Require Automatic Enforcement of All Judgments Entered by Another State.

Even accepting the Eighth Circuit's characterization of the Michigan order as including not only the availability of sanctions against Elwell but also the inadmissibility of his otherwise relevant and non-privileged testimony, the court erred in holding that the order was entitled to strict and rigid enforcement. In the Eighth Circuit's view, the only valid bases for permitting Elwell to testify would be a finding of "lack of jurisdiction over the subject matter, failure to give due notice, or fraud in concoction of the judgment." Pet. at 14a. Amicus suggests that the Full Faith and Credit Clause does not entitle a state court to automatic and unquestioned enforcement of its orders by every other court in the land.

This Court has pointed out that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). *See also Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939). This flexibility stems from the fact that the forum state is also sovereign in its own right. For this reason, "there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 546 (1935). In appropriate cases, the forum may attach paramount importance to its own legitimate interests. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring). On this basis, for example,

the federal district court of Colorado rejected GM's contention that the Michigan injunction rendered Elwell's testimony inadmissible in a products liability action there. Such a result, the court held, would do violence to the sovereign interests of Colorado and would violate its public policy. *Bray v. General Motors Corp.*, No. 93-C-2656, (D. Colo., Jan. 20, 1995) p.5.

Where, as here, the foreign judgment represents an exercise of the equitable jurisdiction of the foreign court, the forum court should possess even broader discretion to tailor its enforcement in light of sound public policy. This Court has not squarely held that a state court is obligated to give full faith and credit to a permanent injunction from a sister state[1]. Assuming that the Full Faith and Credit Clause applies, however, it is well settled that courts possess the inherent power to modify an injunction when it is "satisfied that what it has been doing has been turned into an instrument of wrong." *United States v. Swift*, 286 U.S. at 114-15. Hence, "when the judgment includes an injunction of prospective effect [it] must be balanced against the need, in sound judicial discretion to modify a continuing injunction when circumstances have sufficiently changed." *W.L. Gore & Assoc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992), *citing System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647-48 (1961). Moreover, "[T]he State of the forum has at least as much leeway to disregard the judgment, qualify it, or depart from it as does

[1] As recognized by the *Restatement (Second) of Conflict of Laws* § 102, the issue of whether injunctions are entitled to full faith and credit remains open:

> The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act. No definite statement on the point is therefore made in the rule of this Section.

Restatement (Second) of Conflict of Laws § 102, cmt c.

the state where it was rendered." *Halvey v. Halvey*, 330 U.S. 610, 615 (1947).

In the exercise of this discretion, other courts have modified the Michigan order to permit testimony by Elwell. See *Williams v. General Motors Corp.*, 147 F.R.D. 270, 272-73 (S.D. Ga. 1993); *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 401 (Ky. 1995); *Shoemaker v. General Motors Corp.*, No. 91-0990-CV-W-8 (W.D. Mo., June 18, 1993).

The injunction entered upon the agreement between Elwell and GM clearly implicates the rights of persons who were not represented at that proceeding. At least 30 state and federal courts have been asked by GM to preclude Elwell from participation in civil suits involving third parties.[2] *See* Pet. at 24 ("Addendum"), summarizing cases. The Eighth Circuit is the only appellate court to conclude that the Full Faith and Credit Clause required exclusion of Elwell's testimony.

C. The Court Below Erred in Requiring Exclusion of Evidence as a Remedy for Violation of the Injunction.

ATLA respectfully submits that the issue in this case is not whether the district court gave full faith and credit to the Michigan injunction. The injunction was directed at Elwell. The appropriate remedy for Elwell's violation of that injunction would be a contempt proceeding against him. The Michigan order did not enjoin other courts from permitting Elwell to testify in other civil actions. Nor could a Michigan court bind the courts of other states by such an order. *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

[2] These decisions include seven appellate court opinions and 22 trial court decisions.

The Eighth Circuit in this case fashioned a new and additional remedy for violation of the injunction. In addition to punishing Elwell for violating the order, the court held that third parties must be deprived of any advantage gained by the violation. The court held that testimony violating the injunction is inadmissible in an action by a third party and its introduction may constitute reversible error.

In *Trammel v. United States*, 445 U.S. 40 (1980), this court held that the long-recognized privilege of a husband or wife to prevent adverse testimony from the spouse was no longer consistent with public policy. Nevertheless, in this case, the Eighth Circuit has permitted GM to purchase a privilege to prevent adverse testimony by its former employee. The court further held that GM could make its private agreement binding on every court in the land through the simple expedient of incorporating it into a stipulated injunction.[3]

ATLA suggests that to permit private parties to agree not to testify contravenes strong public policies.

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[3]A consent judgment entered pursuant to a compromise agreement, not based upon any finding of fact or determination on the merits is not a judicial determination by the court of any litigated right. In entering it, the court merely exercises an administrative function in recording what has been agreed to between the parties. *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970) This corresponds to the view in Michigan that:

> The action of the trial judge in signing a judgment based [on the partys' agreement] is ministerial only. The parties have not litigated the matters put in issue, they have settled. The trial judge has not determined the matters put in issue, he has merely put his stamp of approval on the parties' agreement disposing of those matters.

American Mut. Liab. Insur. Co. v. Michigan Mut. Liab. Co., 235 N.W.2d 769 (Mich. Ct. App. 1975).

II. PERMITTING PRIVATE PARTIES TO PREVENT COURTS FROM ADMITTING OTHERWISE RELEVANT TESTIMONY VIOLATES IMPORTANT PUBLIC POLICIES

Whether the decision below is deemed to be an application of the Full Faith and Credit Clause, which accords the forum court discretion to tailor its enforcement to protect state public policy, or whether the Eighth Circuit is deemed to have engrafted an exclusionary rule onto the Clause to further state policy, the Eighth Circuit erred. The court relied on its own conclusory assertion that "Missouri's interest in full and fair discovery [does not override] its interest in giving full faith and credit to a sister state's judgment." Pet. at 14a.

The lower court proffered no explanation of the surprising assertion that the state of Missouri has a strong interest in enforcing an order entered by a Michigan court that deprives Missouri residents, who did not participate in the Michigan action, of critical evidence in a civil suit governed by Missouri law, arising out of the death of a Missouri resident on a Missouri highway. Amicus suggests that Missouri's scant interest in allowing its residents to be penalized for Elwell's violation is far outweighed by Missouri's strong interest in the operation of its own judicial system and the public policy favoring disclosure of information affecting public health and safety.

A. Permitting Private Parties to Render Relevant Testimony Inadmissible By Private Agreement Undermines the Independent Administration of Missouri's Judicial System

The question of what evidence can be heard in a court of law touches on fundamental issues of a states' sovereign control of the administration of its judicial system.

Addressing the threat posed by the Michigan order involved in this and many other civil actions, the district court of Arizona stated:

> The court, indeed every court throughout the nation, exists to serve the ends of justice. When a case cannot be resolved through motion practice this job invariably turns from an analysis of legal principles to a search for the truth. At that point the court must serve as a gatekeeper of evidence; allowing in all that conforms to the web of procedural and evidentiary rules that govern modern litigation. These rules have evolved over time to ensure that the facts presented to the jury are untainted by prejudice or bias ... The Michigan injunction usurps these rules by keeping out *all* of Elwell's testimony. This in turn prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth. As the California Court of Appeals aptly observed when confronted with this issue, "recognition of the injunction would undermine the fundamental integrity of [California's] judicial system." *Stephens v. Superior Ct.*, 49 Cal. Rptr. 2d 20, 27 (Cal. Ct. App. 1996).

Hannah v. General Motors Corp., No. 93-1368 PHX RCB (D.Ariz., May 30, 1996) at p.4-5.

B. Permitting a Litigant to Purchase the Right to Prevent Testimony Concerning Matters Affecting Public Health or Safety Violates Public Policy.

The Michigan injunction, as enforced by the Eighth Circuit, permits GM to prevent a court from receiving

evidence which is harmful to its case. But its effects reach far beyond the courtroom. Thousands of other drivers or passengers in GM vehicles may be at risk of the same tragedy that befell plaintiffs' mother. Permitting GM to conceal information regarding a possible hazard may reduce the ability of consumers, federal safety regulators, or others in the industry to assess the danger and take corrective action. The business of the courts is the public's business. Amicus submits that the courts must not participate in the concealment of potential dangers to the public

The attempt by General Motors to use the courts to conceal information concerning potential dangers to the public is part of a disturbing trend. The past decade has seen a dramatic increase in the use of protective orders and secrecy agreements in civil suits designed to hide information from the public. *See* Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643 (1991). Investigative journalists have uncovered a disturbing number of instances in which parties have used the courts to hide dangerous products, environmental pollution, medical negligence and other dangers from public view. *E.g.*, Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice: Court Secrecy Masks Safety Issues*, Washington Post, Oct. 23, 1988, at A1, col. 3; Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, Newsday, Apr. 24, 1988, at 24; Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, Dallas Morning News, Nov. 22, 1987, at A1.

Although businesses may require a measure of secrecy to foster innovation and competition, hiding public hazards can be deadly. The free flow of information concerning potentially dangerous products is essential to public health and safety and to the just and efficient operation of the civil justice system. Secrecy, whether by agreement of the parties or protective orders, undermines this principle.

The Federal Rules of Civil Procedure establish a presumptive right of public access to information disclosed during discovery in civil actions. It is well settled that "[t]o overcome the presumption [of public access], the party seeking the protective order must show good cause by demonstrating a particular need for protection. A party seeking a protective order bears the burden of establishing good cause. Broad allegations of harm, unsubstantiated by specific examples of articulated reasoning, do not satisfy the Rule 26(c) test. Moreover, the harm must be significant, not a mere trifle." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982); Note, *Protective Orders and the Use of Discovery Materials Following* Seattle Times, 71 Minn. L. Rev. 171, 172 n.3 (1986).

Where the information defendant seeks to conceal concerns a present danger to the health and well-being of other persons, the interest in full disclosure of the hazard outweighs even legitimate economic interests of the defendant.

> Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public. . . . It is inconceivable to this Court that under such circumstances the public interest is not a vital factor to be considered in determining whether a court should be a party to that concealment.

Cipollone v. Liggett Group, Inc., 113 F.R.D. 86, 87 (D.N.J. 1986). *See also In re Agent Orange Prod. Liab. Litigation*, 104 F.R.D. 559, 572 (E.D.N.Y. 1987), *aff'd*, 821 F.2d 139 (2d Cir. 1987)(blanket protective order lifted due to public interest in issue affecting health of veterans and their families); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165

(6th Cir. 1983)(ordering disclosure of tar and nicotine content of cigarettes in view of public interest in health matters); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986)(order permitting plaintiff to disclose to governmental authorities discovery information regarding toxic chemicals in the city's water supply because "public interest required that information bearing on this problem be made available to those charged with protecting the public's health.")

In this case, Amicus argues that the public interest in protecting health and safety and in the just and efficient resolution of civil actions outweigh any interests in enforcing an injunction whose sole objective is to keep critical and possibly incriminating information secret. Employer/employee secrecy arrangements have generally been disfavored by courts that have had the occasion to consider them. For instance, in *Chambers v. Capital Cities*, the court stated:

> It has been recognized that at least in some circumstances, agreements obtained by employers requiring former employees to remain silent about underlying events leading up to disputes, or concerning potentially illegal practices ... can be harmful to the publics ability to rein in improper behavior, and in some contexts the ability of the United States to police violations of its laws.

Chambers v. Capital Cities, 159 F.R.D. 441, 444 (S.D.N.Y. 1995).

This strong public policy favoring openness of the courts is particularly strong in products liability cases, which frequently involve dangers to persons beyond the parties to the lawsuit. As stated by one federal district court refusing to exclude Mr. Elwell's testimony under the Michigan injunction:

> Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret matters is outweighed by the public interest in full and fair discovery.

Williams v. General Motors Corp., 147 F.R.D. 270, 273 (S.D.Ga.1993).

CONCLUSION

For these reasons, ATLA urges this Court to reverse the judgment Court of Appeals for the Eighth Circuit and reinstate the judgment of the district court entered upon the jury's verdict.

Respectfully submitted,

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